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and Brian Butcher

**IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF CALIFORNIA**

MOHAMAD ALI SAID, an individual,
Plaintiff,

v.

COUNTY OF SAN DIEGO; DEPUTY
SHERIFF PATRICK LOPATOSKY;
DEPUTY SHERIFF BRIAN BUTCHER;
DEPUTY SHERIFF LEE SCOTT; and
DOES 1 - 50, inclusive,
Defendants.

No. 12-cv-2437-GPC(RBB)

SEPARATE STATEMENT OF
UNDISPUTED MATERIAL FACTS IN
SUPPORT OF DEFENDANTS' MOTION
FOR PARTIAL SUMMARY JUDGMENT

Date: April 10, 2013
Time: 1:30P.M.
Dept.: 2D- Courtroom of the
Honorable Gonzalo P. Curiel
Trial Date: TBD

Pursuant to Rule 56 of the Federal Rules of Civil Procedure, and this Court's Civil
Pretrial Procedures, Defendants County of San Diego, Patrick Lopatosky, and Brian
Butcher (collectively, "Defendants") hereby submit the following Separate Statement of
Undisputed Material Facts in support of their Motion For Partial Summary Judgment.

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STATEMENT OF UNDISPUTED FACTS

A. Defendant County of San Diego Entitled to Summary Judgment as to Plaintiff's Second Cause of Action for Violation of 42 U.S.C. § 1983

Defendant County of San Diego is entitled to summary judgment as to Plaintiff's second claim for relief under 42 U.S.C. § 1983, because Plaintiff has no evidence that an "action pursuant to official municipal policy" or a failure to train amounting to deliberate indifference to individuals' constitutional rights was the "moving force" behind his alleged injury, based on the following undisputed facts:

| <u>UNDISPUTED FACTS</u> | <u>SUPPORTING EVIDENCE</u> |
|---|--|
| <p>1. On August 11, 2014, Defendant Patrick Lopatosky served Plaintiff with Special Interrogatory No. 16 which asked Plaintiff to "State all facts in support of your contention that the County of San Diego 'has unlawful policies, customs and habits of improper and inadequate hiring, training, retention, discipline and supervision of its sheriff's deputies' as alleged at ¶ 39 of your Second Amended Complaint.</p> | <p>Declaration of Stephanie Karnavas ("Karnavas Decl."), ¶ 2, Ex 1 [Interrogatory No. 16].</p> |
| <p>2. In response to Special Interrogatory No. 16, Plaintiff stated: "The facts of this case where several officer conspire to storm a citizen's adobe arrest him without any probable cause and then break his elbow with the use of excessive force clearly unwarranted and then filing</p> | <p>Karnavas Decl. ¶ 2, Ex. 2 [Resp. to Interrogatory No. 16].</p> |

1 false reports and instigating false criminal
2 proceedings that intended only to scare and
3 coerce justice so that they escape
4 punishment for what they did violating
5 every oath and promise to protect the
6 citizens they instead violated. After all this
7 and you see all these officers protected by
8 the County instead of being investigated
9 and punished. If you were the victim of
10 what I am claiming what would you
11 describe the County system as? I know
12 what has happened and if the officers has
13 [sic] been investigated and remain free and
14 unpunished then it must be the custom,
15 policy or practice to ignore citizen's
16 complaints. San Diego County supported
17 the officer's request to file erroneous
18 charges and dropping the charges when the
19 coercion is about to be exposed. SD
20 County is notorious for all aspects of these
21 violations and if you simply do a google
22 search of all these aggressive unlawful
23 behaviors and demeanors of officers you
24 will be surprised with the responses which
25 will confirm our allegation."
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| 1 2 3 4 5 6 7 8 9 10 11 | 3. On August 11, 2014, Defendant Patrick Lopatosky served Plaintiff with Special Interrogatory No. 17 which asked Plaintiff to “State all facts in support of your contention that the County of San Diego ‘has a custom, policy, or practice of failing to properly investigate citizen complaints and failing to take corrective or disciplinary action against deputies who act improperly’ as alleged at ¶ 39 of your Second Amended Complaint. | Karnavas Decl. ¶ 2, Ex. 1. [Interrogatory No. 17]. |
| 12 13 14 15 | 4. In response to Special Interrogatory No. 17, Plaintiff simply referred back to the same response he gave in response to Special Interrogatory No. 16. | Karnavas Decl. ¶ 2, Ex. 2 [Resp. to Interrogatory No. 17]. |
| 16 17 18 19 20 21 22 23 24 25 26 27 | 5. On August 11, 2014, Defendant Patrick Lopatosky served Plaintiff with Special Interrogatory No. 18 which asked Plaintiff to “State all facts in support of your contention that the County of San Diego ‘has an unlawful policy, custom, or habit of permitting or condoning unlawful searches and seizures, false arrests and the unnecessary and excessive use of force by sheriff’s deputies’ as alleged at ¶ 40 of your Second Amended Complaint.” | Karnavas Decl. ¶ 2, Ex. 1. [Interrogatory No. 18]. |

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| 1 2 3 4 | 6. In response to Special Interrogatory No. 18, Plaintiff simply referred back to the same response he gave in response to Special Interrogatory No. 16. | Karnavas Decl. ¶ 2, Ex. 2 [Resp. to Interrogatory No. 18]. |
| 5 6 7 8 9 10 11 12 13 14 15 16 17 18 | 7. On August 11, 2014, Defendant Patrick Lopatosky served Plaintiff with Special Interrogatory No. 19 which asked Plaintiff to “State all facts in support of your contention that the County of San Diego has an ‘unlawful policy, custom and habit of discouraging citizen complaints against errant deputies and failing to properly investigate citizen complaints against sheriff’s deputies, including complaints of false arrest, excessive force, and unlawful searches and seizures’ as alleged at ¶ 42 of your Second Amended Complaint.” | Karnavas Decl. ¶ 2, Ex. 1. [Interrogatory No. 19]. |
| 19 20 21 22 | 8. In response to Special Interrogatory No. 19, Plaintiff simply referred back to the same response he gave in response to Special Interrogatory No. 16. | Karnavas Decl. ¶ 2, Ex. 2 [Resp. to Interrogatory No. 19]. |
| 23 24 25 26 27 28 | 9. On August 11, 2014, Defendant Patrick Lopatosky served Plaintiff with Special Interrogatory No. 20 which asked Plaintiff to “State all facts in support of your contention that the County of San | Karnavas Decl. ¶ 2, Ex. 1. [Interrogatory No. 20]. |

Diego has ‘refused to investigate, or have inadequately investigated, numerous complaints of false arrest, excessive force, and unlawful searches and seizures made by citizens against its sheriff’s deputies over many years, including complaints that resulted in substantial jury verdicts against deputies and the County’ as alleged at ¶ 42 of your Second Amended Complaint.”

10. In response to Special Interrogatory No. 20, Plaintiff simply referred back to the same response he gave in response to Special Interrogatory No. 16.

Karnavas Decl. ¶ 2, Ex. 2 [Resp. to Interrogatory No. 20].

B. Defendants Lopatosky and Butcher Are Entitled to Summary Judgment of Plaintiff’s Claim For Violation of 42 U.S.C. § 1983 Based on Unlawful Arrest and His Corresponding State Law Claim For False Arrest

Plaintiff cannot prevail on his § 1983 claim against Deputies Butcher and Lopatosky based on unlawful arrest or his corresponding state law claim for false arrest because he was arrested pursuant to probable cause, based on the following undisputed facts. Additionally, Deputies Butcher and Lopatosky are entitled to qualified immunity as to Plaintiff’s § 1983 claim based on unlawful arrest.

| <u>UNDISPUTED FACTS</u> | <u>SUPPORTING EVIDENCE</u> |
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| 11. Plaintiff was a defendant in a domestic violence misdemeanor complaint that was filed in June 16, 2009 in the Superior Court of California, County of San Diego, East County Division, alleging | Request For Judicial Notice (“RJN”), Ex. 1; Karnavas Decl., Ex. 3 [RFAs to Plaintiff], RFA No. 1 [deemed admitted]; Karnavas Decl. Ex. 4 [Plaintiff’s Depo] at 14:12-19; 18:7-25; 19:5-10. |

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| 1 | three counts for: 1) Corporal Injury to | |
| 2 | Spouse and/or Roommate, Penal Code | |
| 3 | Section 17(b)(4); 2) Battery of a Current or | |
| 4 | Form Significant Other, Penal Code | |
| 5 | Section 243(e)(1) and 3) Battery, Penal | |
| 6 | Code section 242, alleging the use of force | |
| 7 | and violence, and the infliction of injury on | |
| 8 | his spouse, Walaa Said, aka Walaa | |
| 9 | Alqershi. | |
| 10 | 12. A Criminal Protective Order against | RJN, Ex. 2; |
| 11 | Plaintiff in favor of Walaa Said as the | Karnavas Decl., Ex. 3 [RFAs to Plaintiff], |
| 12 | protected person was issued on July 13, | RFA No. 2 [deemed admitted]. |
| 13 | 2009. | |
| 14 | 13. On March 24, 2010, a jury found | RJN, Ex. 3; |
| 15 | Plaintiff guilty of the crime of Battery of a | Karnavas Decl., Ex. 3 [RFAs to Plaintiff], |
| 16 | Significant Other in violation of Penal | RFA Nos. 3-4 [deemed admitted]; |
| 17 | Code section 243(e)(1), and Simple Battery | Karnavas Decl., Ex. 4 [Plaintiff's Depo] at |
| 18 | in violation of Penal Code section 242 for a | 142:2-22. |
| 19 | domestic violence incident involving his | |
| 20 | wife. | |
| 21 | 14. Plaintiff was sentenced in May 2010, | RJN, Ex. 4-5; |
| 22 | to, among other things, three years of | Karnavas Decl., Ex. 3 [RFAs to Plaintiff], |
| 23 | summary probation, a condition of which | RFA Nos. 6-8 [deemed admitted]; |
| 24 | was compliance with a criminal protective | Karnavas Decl., Ex. 4 [Plaintiff's Depo] at |
| 25 | order that prohibited Plaintiff from having | 142:14-24; 146:21-25; 168:1-5; 169:5-19; |
| 26 | any personal, electronic, telephonic, or | 170:810; 175:10-21; 176:22-177:4; 177:24- |
| 27 | written contact with Ms. Al-Quershi or | 178:9; 180:10-14; 185:2-7. |
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| 1 | from coming within 100 yards of her. The | |
| 2 | protective order also required Plaintiff to | |
| 3 | stay away from Ms. Al-Qershi's home, | |
| 4 | employment, or vehicle. | |
| 5 | 15. The protective order was to expire on | RJN, Exs. 4-5; |
| 6 | May 23, 2013. | Karnavas Decl., Ex. 3 [RFAs to Plaintiff], |
| 7 | | RFA No. 9[deemed admitted]; |
| 8 | | Karnavas Decl., Ex. 6, ["Lopatosky Depo"] |
| 9 | | at 62:11-22. |
| 10 | 16. Plaintiff was plainly informed of the | Karnavas Decl., Ex. 4 [Plaintiff's Depo] at |
| 11 | meaning of the protective order at his | 142:14-24; 146:21-25; 168:1-5; 169:5-19; |
| 12 | sentencing hearing and at that hearing was | 170:810; 175:10-21; 176:22-177:4; 177:24- |
| 13 | clearly admonished by Judge Roderick | 178:9; 180:10-14; 185:2-7; |
| 14 | Shelton that only the Court could rescind | Karnavas Decl. ¶ 7, Ex. 7 [audio recording |
| 15 | the order and that no contact with Ms. | of sentencing]. |
| 16 | Alqershi meant absolutely no contact. | |
| 17 | 17. Plaintiff had an Arabic interpreter at | Karnavas Decl., Ex. 4 [Plaintiff's Depo] at |
| 18 | his trial and sentencing and Plaintiff | 144:12-17; 146:21-25; 168:1-5; 169:5-19; |
| 19 | admitted in his deposition that he | 170:810; 175:10-21; 176:22-177:4; 177:24- |
| 20 | understood the terms of his sentence. | 178:9; 180:10-14; 185:2-7. |
| 21 | 18. At some point subsequent to | Karnavas Decl., Ex. 4 [Plaintiff's Depo] at |
| 22 | Plaintiff's criminal sentencing, Ms. | 222:2-24. |
| 23 | Alqershi became pregnant with Plaintiff's | |
| 24 | second child, a daughter, to whom she gave | |
| 25 | birth on October 1, 2011. | |
| 26 | 19. On January 24, 2012, at | Declaration of Hanan Harb ["Harb Decl."] ¶ |
| 27 | approximately 5:50p.m., the Sheriff's | 4, Ex. A. |
| 28 | | |

Department communications center received a 911 call from a woman identifying herself as Walaa Al-Qershi. Ms. Al-Qershi indicated, among other things, that she had a restraining order against her husband, but she was living with him and that he was driving her crazy, and she was afraid he was going to kill her. Ms. Al-Qershi requested law enforcement assistance and while on the phone, she indicated she was leaving her house located at 3755 El Canto Dr. and was walking to her neighbor's house located at 3725 El Canto Dr.

20. Deputies Butcher and Lopatosky were on patrol on the evening of January 24, 2012, and received a radio call to respond to 3755 El Canto Dr., Spring Valley, California to contact an individual who may have been "5150", in other words, a person who, as a result of a mental health disorder, is a danger to others, or to himself or herself, or is gravely disabled. At some point the address for the call was changed to 3725 El Canto Dr. - a house a couple of houses down from the original address.

Declaration of Brian Butcher ["Butcher Decl."] ¶ 2;
Declaration of Patrick Lopatosky ["Lopatosky Decl."] ¶ 2.

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| 1 | 21. Psychiatric Emergency Response | Butcher Decl. ¶ 2. |
| 2 | Team (“PERT”) clinician, Cynthia Van | |
| 3 | Lom, was assigned to work with Deputy | |
| 4 | Butcher and was riding with him in his | |
| 5 | patrol vehicle. | |
| 6 | 22. Deputy Butcher and Ms. Vam Lom | Butcher Decl. ¶ 2; |
| 7 | arrived at 3725 El Canto Dr. first, and made | Lopatosky Decl. ¶ 2. |
| 8 | contact with the reporting party, Walaa | |
| 9 | Alqershi. | |
| 10 | 23. They determined that Ms. Alqershi | Butcher Decl. ¶ 2. |
| 11 | was not “5150” but was upset with her | |
| 12 | husband. Deputy Butcher was aware that | |
| 13 | Ms. Alqershi and her husband had a history | |
| 14 | of domestic violence because he had | |
| 15 | arrested her husband for spousal abuse in | |
| 16 | violation of Penal Code 273.5(a) back in | |
| 17 | April 2009. | |
| 18 | 24. Ms. Alqershi told Deputy Butcher | Butcher Decl. ¶ 3. |
| 19 | and Ms. Van Lom that she and Plaintiff had | |
| 20 | been living together, and that on that | |
| 21 | evening, Plaintiff had threatened to kill her | |
| 22 | and any cops that showed up if she called | |
| 23 | the cops on him. Ms. Alqershi wanted | |
| 24 | Plaintiff arrested. | |
| 25 | 25. Deputy Lopatosky arrived at the | Butcher Decl. ¶ 4; |
| 26 | scene shortly Deputy Butcher. Deputy | Lopatosky Decl. ¶ 2. |
| 27 | Butcher told him that he had spoken with | |
| 28 | | |

Ms. Alqershi, and that he believed this was a violation of a restraining order call.

26. Deputy Lopatosky took over as the primary deputy on the scene and also spoke directly to Ms. Alqershi. She told Deputy Lopatosky that she and Plaintiff had been married for about 5 years, that they currently live together, and have two children together, a four year old and a 3 month old.

27. Ms. Alqershi indicated that she had been the victim of domestic violence by her husband about a year and a half earlier, and that as a result of that incident, a restraining order was issued against him, that he had been served with the order, and that he was not to be within 100 yards of her. Ms. Alqershi indicated that she had stayed at a shelter called Becky's House after the domestic violence incident but that after her stay at Becky's House, Plaintiff picked her up and they had been living together ever since, even though the restraining order was still in place.

28. Ms. Alqershi told Deputy Lopatosky that on that evening, her husband had threatened to kill her, kill any responding

Butcher Decl. ¶ 4;

Lopatosky Decl. ¶¶ 2-3.

Lopatosky Decl. ¶ 3.

Lopatosky Decl. ¶ 3.

1 law enforcement, and then kill himself, but
 2 that he had not done anything to her
 3 physically. Ms. Alqershi wanted Plaintiff
 4 arrested.

5 29. Deputy Lopatosky also confirmed
 6 that while Ms. Alqershi appeared upset by
 7 the circumstances with her husband, she
 8 did not appear to be suffering from any
 9 type of mental health disorder.
 10

Lopatosky Decl. ¶ 3.

11 30. Deputy Butcher conducted a records
 12 check through the Sheriff's inquiry
 13 channel, and the records check revealed
 14 there was an active domestic violence
 15 criminal protective order issued in case
 16 number C291668, listing Plaintiff as the
 17 restrained person, and Ms. Alqershi as the
 18 protected person. The deputies were
 19 informed through the records check that
 20 order was reported to have been served by
 21 Judge Shelton, and was set to expire on
 22 May 23, 2013, and that the terms of order
 23 prohibited Plaintiff from having any
 24 contact with Ms. Alqershi.
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Butcher Decl. ¶ 5;
 Lopatosky Decl. ¶ 2;
 Karnavas Decl., Ex. 5 [Butcher's Depo] at
 33:18-34:12; 38:16-24;
 Karnavas Decl., Ex. 6 [Lopatosky Depo] at
 36:21-37:7; 38:16-39:5; 60:16-63:5.

31. Based on the information they were provided, Deputies Lopatosky and Butcher believed in good faith that Plaintiff was in violation of the protective order.

Butcher Decl. ¶ 5;
Lopatosky Decl. ¶ 4, Ex. A

C. Defendants Lopatosky and Butcher Are Entitled to Summary Judgment of Plaintiff's Claim For Violation of 42 U.S.C. § 1983 Based on Inadequate Medical Care

Plaintiff cannot prevail on his § 1983 claim against Deputies Butcher and Lopatosky based on inadequate medical care because he cannot establish the Deputies were deliberately indifferent to his serious medical needs. Rather, the undisputed evidence demonstrates that the Deputies immediately summoned the necessary medical assistance. Additionally, Deputies Butcher and Lopatosky are entitled to qualified immunity as to this claim.

| <u>UNDISPUTED FACTS</u> | <u>SUPPORTING EVIDENCE</u> |
|---|--|
| 32. Deputy Lopatosky and Deputy Butcher made contact with Plaintiff at 3755 El Canto Dr. | Butcher Decl. ¶ 6; Lopatosky Decl. ¶ 5. |
| 33. Plaintiff was handcuffed and complained of injury to his arm. | Butcher Decl. ¶ 6; Lopatosky Decl. ¶ 5. |
| 34. As soon as Plaintiff complained his arm had been injured, Deputy Butcher immediately summoned the Fire Department for paramedic assistance. | Butcher Decl. ¶ 6; Lopatosky Decl. ¶ 5. |
| 35. The paramedics arrived approximately five minutes later and Plaintiff was taken via ambulance to the hospital for evaluation. | Butcher Decl. ¶ 6; Lopatosky Decl. ¶ 5; Karnavas Decl., Ex. 4 [Plaintiff's Depo] at 88:4-12. |

D. Defendants Lopatosky and Butcher Are Entitled to Summary Judgment of Plaintiff's Claim For Violation of 42 U.S.C. § 1983 Based on Malicious Prosecution

Plaintiff cannot prevail on his § 1983 claim against Deputies Butcher and Lopatosky based on malicious prosecution because there was, at a minimum, probable cause to arrest Plaintiff for violation of the protective order held by his wife.

Additionally, Plaintiff has no evidence that the prosecution was initiated with malice or that either Deputy Lopatosky or Deputy Butcher took any action to compromise the prosecutor's independent judgment, and thus he has no evidence to overcome the presumption set forth in *Smiddy v. Varney*, 665 F.2d 261, 266 (9th Cir. 1981).

Defendants rely on undisputed facts 11-31, and the evidence cited in support thereof to demonstrate that there was probable cause for Plaintiff's arrest. The following additional facts and evidence demonstrate that Plaintiff has no evidence to overcome the *Smiddy* presumption:

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| 36. Plaintiff was charged with violation of Penal Code sections 69/17(b)(4), 273.6(a), and 166(c)(1) in connection with the incident that is the subject of this lawsuit. | RJN, Ex. 6. |
| 37. Plaintiff has no evidence that either Deputy Lopatosky or Deputy Butcher took any action to compromise the prosecutor's independent judgment in that action. | Karnavas Decl., Ex. 5 [Butcher's Depo] at 73:4-13; 77:6-9; Karnavas Decl., Ex. 6 [Lopatosky Depo] at 95:3-8; 96:1-8; 98:17-20. |

E. Defendants Are Entitled to Summary Judgment of Plaintiff's Claim For Violation of California Civil Code § 52.1

Plaintiff cannot prevail on his claim for violation of California Civil Code § 52.1 because, the undisputed facts demonstrate that Plaintiff can prove no constitutional violation based

1 on unlawful arrest, inadequate medical care, or malicious prosecution, and the only other
2 constitutional violation Plaintiff alleges – excessive force—cannot in and of itself, also
3 comprise an alleged constitutional interference that gives rise to liability under § 52.1.
4 The alleged conduct must be shown to have been committed for the purpose of
5 interfering with some other constitutional right. Defendants rely on undisputed facts 11-
6 37 above, and the evidence cited in support thereof in support of summary judgment of
7 this claim.

8 DATED: February 23, 2015 THOMAS E. MONTGOMERY, County Counsel
9
10 By: s/ STEPHANIE KARNAVAS, Senior Deputy
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